FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE NATIONWIDE PUBLIC PROJECTS COALITION (CO), BRAZOS RIVER AUTHORITY (TX), GRANITE CONSTRUCTION COMPANY (CA), HELIX WATER DISTRICT (CA), RANCHO CALIFORNIA WATER DISTRICT, SEMITROPIC WATER DISTRICT (CA), WEST SAN BERNARDINO COUNTY (CA) WATER DISTRICT, METROPOLITAN DENVER (CO) WATER AUTHORITY, DRAKE HOMES, INC. (CA), METROPOLITAN WATER PROVIDERS (CO), WHEELER-RIDGE MARICOPA WATER STORAGE DISTRICT (CA), THE CITY OF SAFFORD (AZ), THE VILLAGES OF OCEAN BEACH AND SALTAIRE (NY), AND THE FIRE ISLAND (NY) ASSOCIATION IN SUPPORT OF RESPONDENTS

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United States Supreme Court Rule 37.3. 1

INTERESTS OF THE *AMICI CURIAE*

The *amici* are public sector agencies, private entities and municipalities that provide essential services to the public.[1] The *amici* include:

Nationwide Public Projects Coalition (NPPC), a not-for-profit corporation whose members include representatives of state, regional and local government agencies and associations, and private sector entities. Its members furnish the public with basic services and projects such as water supply facilities, irrigation, flood control, transportation and other infrastructure projects.

Brazos River Authority (BRA), established by the Texas legislature in 1929 to conserve, develop and put to beneficial use, the surface water resources within the Brazos River basin. BRA's jurisdiction covers 42,000 square miles, and operates a system of reservoirs with a combined water supply capacity of more than 210 billion gallons. BRA has encountered the ESA's land use prohibitions in several of its hydroelectric and pipeline projects.

Granite Construction Company, a large heavy civil contractor and construction materials producer operating nationwide, primarily in the west and southwest United States. It has provided services and materials to public and private projects that have been delayed and rendered more costly by ESA requirements.

Helix Water District, serving 50 square miles and a quarter million people in the heart of San Diego County, California. To satisfy federal drinking water requirements and meet future demands, Helix must expand the capacity of its treatment plant to 106 million gallons per day. In connection with the expansion, Helix is required

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[1] The parties have consented to the filing of this brief. The *amici* have filed letters of consent with the Clerk pursuant to this Court's Rule 37.3.

to purchase land, requiring perpetual payments for maintenance, as part of an expensive mitigation program for an endangered bird species.

Rancho California Water District (RCWD), which provides water and sewer service over a 150 square mile area in southwestern Riverside County, California. Sixty thousand residents and 18,000 businesses rely on RCWD for potable water. The ESA has delayed and driven up costs on numerous capital improvement projects undertaken by RCWD.

Semitropic Water Storage District (STWSD), located in the San Joaquin Valley, supplies water to 221,000 acres, with about 136,000 acres irrigated, in Kern County, California. The ESA has increased STWSD's operation and maintenance expenses on water projects. It is also required to set aside lands for species preservation through the Kern County Habitat Conservation Plan.

West San Bernardino County Water District (WSBCWD), a public agency organized and existing pursuant to the California Water Code, serving the County of San Bernardino. It provides domestic and fire protection water to a population of 45,000 in southern California. WSBCWD has faced the ESA's land use prohibitions arising from the listing of an endangered fly species. *See infra* at 4-6.

Metropolitan Denver Water Authority (MDWA), a political subdivision and public corporation of the State of Colorado. MDWA, made up of 20 local governments working together to develop water supplies for the Greater Metropolitan Denver, Colorado area has a total constituency of more than 300,000 persons. It repeatedly encounters ESA regulation in connection with permits it must receive to construct water facilities.

Drake Homes, Inc., a land development and single-family home construction business, serving the northern Cali-

fornia area. Drake owns several thousand acres in the Chico area that are directly impacted by the outcome of this case, because the property contains "vernal pools" that have historically been habitat for several species of an ESA-listed crustacean.

Metropolitan Water Providers (MWP), an unincorporated association of over 20 local governments and quasi-local governments whose mission is to develop water supplies for the greater metropolitan Denver, Colorado area. MWP and its individual members typically encounter costly delays from the ESA's habitat modification prohibitions, in projects such as construction of wastewater treatment facilities and water transmission pipelines.

Wheeler Ridge-Maricopa Water Storage District (WRMWSD), a water storage district and political subdivision of the State of California, encompasses 228 square miles of agricultural lands south of Bakersfield, California. WRMWSD provides water service to about 60% of these lands. Farming activities and water supply facilities within WRMWSD have been impacted by FWS's "harm" regulation.

The City of Safford, a municipal corporation located in southeast Arizona. Safford is responsible for providing water to its 18,000 residents. A flood from 1993 severely damaged their water supply facility, and, during its emergency repair, they encountered expensive delays from ESA implementation. *See infra* at 11-12.

The Incorporated Villages of Ocean Beach and Saltaire, located on Fire Island, New York, a roadless barrier island subject to overwashes and breaching from the Atlantic Ocean. ESA implementation presents great difficulties for these municipalities to implement an essential erosion prevention program. *See infra* at 8-10.

The Fire Island Association, Inc., a league of 18 property owner associations, including those from the aforementioned *amici.*

The impact of this case on the *amici,* and on the public they serve, is staggering. Enforcement by the Fish and Wildlife Service (FWS) of its "harm" regulation repeatedly delays completion deadlines for vital public works ventures, rendering them unduly expensive and depriving the public of needed services. FWS asserts that its "harm" definition is textually premised on *actual* death or injury to species. This argument bears little resemblance to the regulation's implementation in the field. On many occasions, FWS has found a prohibited "take" under Section 9 of the Endangered Species Act of 1973, with little if any supporting evidence that a species will sustain "actual" harm. It has brought numerous projects to a standstill, with a simple proffer of unsupported allegations that a certain land use may have some potential impact, at some unknowable point in time, on some unidentified member of an endangered species. The *amici* submit several illuminating examples of FWS's abuses of its authority:

1. *West San Bernardino County Water District (Water District):* In the summer of 1993, *amicus* Water District identified a need to locate a domestic water supply in light of the drought plaguing California. It drilled a well on an 80' x 120' lot (the Lot) in the City of Rialto. The following September, FWS conferred all of the Act's protections on an insect, when it listed the Delhi Sands flower-loving fly (the Fly). 58 Fed. Reg. 49,887 (Sept. 23, 1993). The well still needed to be equipped and connected to existing facilities. The Water District feared reports of criminal sentences and $50,000 fines if any of its activities modified potential Fly habitat. It contacted FWS to expediently resolve the controversy so the already-drilled well could be made operable.

The Water District faced months of unanswered phone calls and red tape. FWS finally responded in a November 4, 1994 letter, prohibiting all activities on the Lot. *Infra* App. 1a-4a. The agency stated its "current policy . . . is to consider all areas on Delhi Sands with suitable . . . habitat *as occupied*" by the Fly. Inexplicably, the Agency also admitted that its experts found no Flies on the Lot in 1994. Nonetheless, FWS warned the Water District that any disturbance of the "habitat" on the 80' by 120' Lot would "take" the Fly and violate ESA Section 9. The letter expressly cites the "harm" regulation, and its prohibition on habitat modification, as the basis for likely "take" liability. FWS would permit "takes" of the Fly incidental to the well activity, but only if the Water District submitted a Habitat Conservation Plan (HCP) pursuant to ESA §10(a)(1)(B). The HCP application required the Water District to post "adequate funding" to insure Plan implementation.

Rather than submit to FWS's ultimatum, the Water District hired an entomologist to determine the quality of Fly habitat on the Lot. He determined that no flies existed on the plot. He located the nearest Fly nest over half a mile away. Moreover, he concluded that the Lot, at best, contained degraded habitat. The Water District communicated the entomologist's findings, and is presently awaiting another response from FWS. Meanwhile, more than 18 months after FWS listed the Fly, the well remains untapped.

The Fly's listing has affected other projects in San Bernardino County. For example, FWS mandated that the San Bernardino County Medical Center (Medical Center) move and redesign an expansion to its facility to provide 1.92 acres of protected habitat for eight Flies believed to occupy the site. FWS insisted that failure to mitigate would have "harmed" the insects' habitat and exposed

the Medical Center to possible "take" liability. The Medical Center spent $3,310,199.00 to implement the required mitigation, at a cost per Fly of $413,774.25 and a one-year construction delay. This cost is the estimated equivalent to the average cost of treatment for 494 inpatients or 23,644 outpatients. App. 5a-6a.

2. *Los Angeles County Department of Public Works (LACDPW):* In June 1992, LACDPW, a member of NPPC (but not itself separately an *amicus*), developed the San Gabriel Canyon Sediment Management Plan (SMP). The SMP's goal is to remove sediment from a system of three reservoirs operated by LACDPW. These reservoirs, constructed in the 1930s, have lost approximately 25% of their original storage capacity from sediment deposition, which reduces the amount of flood protection they provide. Nonetheless, they afford significant water conservation benefits. If additional sediment enters the reservoirs and is not removed, there is danger that runoff from a major storm would exceed the downstream channel's design capacity and cause extensive flood damage.

One process LACDPW identified to clean the dams is Flow Assisted Sediment Transport (FAST). FAST involves maintaining the reservoir's water surface elevation at the lowest outlet on the dam. During storms this outlet is opened to release water at the same rate as runoff into the dam. Thus, FAST allows sediment-laden flows to pass in a manner that emulates natural conditions that would exist if the dam had never been built. LACDPW also identified a process called "sluicing," which uses equipment to agitate deposited sediment, thereby increasing the amount of sediment that can be transported by the flows.

In a February, 1993 Draft Environmental Impact Statement/Environmental Impact Report (collectively,

DEIS), LACDPW analyzed in depth several alternative courses of action, including but not limited to FAST and sluicing. LACDPW elected to pursue the FAST approach at one reservoir and sluicing at the other two. This preferred alternative will require an estimated expenditure of $16 million over a 20-year period.

FWS commented on the DEIS. It criticized LACDPW's preferred alternative, speculating impacts on the potential habitat of the Least Bell's Vireo (an ESA-listed endangered bird species; *see* 51 Fed. Reg. 16,482 (May 2, 1986)) and of the two-striped garter snake (a species proposed for listing under the ESA).[2] Literature reviews, however, indicate that none of these species have been seen in the project's vicinity for over 20 years. FWS adduced no evidence that either the bird or the snake in fact occupied the area.

LACDPW prepared a revised DEIS (at a taxpayer cost of an additional $151,000), and distributed it in August, 1994 for public comment. The revised DEIS included additional biological information showing that the project area was uninhabited by either Snake or Bird. LACDPW also reconfigured their preferred alternative to include additional mitigation measures minimizing any possible adverse impacts on those species. FWS remained inflexible. It indicated that ESA §7 consultation[3] may be required. App. 7a-18a. FWS commanded LACDPW to conduct more field surveys for other endangered, threatened and candidate species, including the Foothill yellow legged frog, the Mountain yellow legged frog,

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[2] FWS prefers the most expensive alternative, requiring LACDPW to construct a slurry pipeline at an anticipated cost of $164 million.

[3] *See infra* at 15-16. One of FWS's purposes in requiring Section 7 consultation is to insure that ESA-listed species are not "taken" by the proposed activity.

Smooth spikeweed, Braunton's milk-vetch, Gambel's watercross, the Los Angeles pocket mouse, the California leaf-nosed bat, the Wandering skipper and the Oblivious tiger beetle. In FWS's opinion, all of these and others *could* be impacted by the project and *may* be in the vicinity. *See* App. 12a.

While FWS requires LACDPW to collect more data on more species that "may occur" in the area, the public safety of the people of Los Angeles County is being compromised by the delay of this critically-needed flood control and water conservation project. Because LACDPW cannot finance the project in the manner FWS requires, it may be forced to remove one or more of the sediment-filled reservoirs from service. Even this course of action may face challenge. The dams at issue provide lush downstream habitat for other wildlife. If LACDPW renders them inoperable, it could face "take" liability for "harming" species downstream. LACDPW is, quite literally, damned if it does and damned if it doesn't.

3. *Fire Island, New York:* The south shore communities of Long Island, New York, including the *amici* incorporated Villages of Ocean Beach and Saltaire, are less than a two-hour drive from midtown Manhattan. Harsh storms in recent years have ravaged these coastal areas. The winter nor'easters from 1992-93 caused over $230 million in damage to homes, businesses and infrastructure. Fire Island, one of the barrier islands protecting the Long Island mainland and the Great South Bay (a major shellfishery and recreational resource) from the Atlantic Ocean, has endured significant erosion damage. Currently, serious "breaches"[4] of Fire Island from Atlantic

[4] Barrier islands like Fire Island are narrow and can be overwashed by ocean waves in severe coastal storms. Unattended overwashes become "breaches," wherein water flows at shallow depths

[footnote continued]

inundation receive no coordinated, prompt attention. Larger breaches will be exorbitantly expensive if not impossible to close. For example, one overwash from the December, 1992 nor'easter could have been closed quickly. However, without a response program in place, it enlarged to a breach half a mile wide and 20 feet deep. All of the structures displaced by the breach were lost. It cost almost $8 million to close.

In 1993, then-Governor Cuomo appointed a multi-agency Coastal Erosion Task Force to address the chronic flooding and erosion. It developed a plan to provide emergency beach nourishment (Emergency Plan),[5] to fill in those areas of Fire Island overwashed by Atlantic tempests. The Emergency Plan is a stop-gap, post-storm measure, pending development of a more long-term program, to deter expansion of breaches on the barrier island. No federal funding is allocated to assist financing this critical erosion response program.

Myriad federal, state and municipal agencies worked cooperatively to forge the Emergency Plan.[6] The Emergency Plan provides special protection for environmentally sensitive areas. For example, unique considerations are afforded to habitat of the Piping plover, an ESA-listed endangered bird (*see* 50 Fed. Reg. 50,733 (Dec. 11, 1985)). Plovers are adapted to storm-maintained areas

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from ocean to bay continuously at low tide. Breaches, in turn, are widened and deepened by natural hydraulic forces and can quickly become new "inlets," or passageways between two islands connecting ocean to bay.

[5] A list of documents pertaining to the development of the Emergency Plan is contained in the Appendix. *See* App. 32a.

[6] The National Park Service Proposed the Interim Plan. It was developed with input from the U.S. Army Corps of Engineers, the New York State Department of Environmental Conservation, the New York State Department of State, the New York Sea Grant Program, the Suffolk County Planning Department, and the Towns of Islip and Brookhaven, in consultation with FWS.

like ephemeral pools and overwash fans. The Emergency Plan requires that, if a proposed breach fill occurs during the Plover's nesting season, a qualified plover monitor be retained prior to fill activity; the monitor is to conduct at least three days of surveying in the vicinity of the precise site where fill activity will occur; the monitor will oversee the fill activity while it is carried out; and nesting sites, with buffer zones, must be cordoned off with fencing to reduce pedestrian and vehicle traffic.

Despite these requirements designed specifically to protect the plover, the sole opponent to the Emergency Plan is FWS. It has wielded its authority to require lengthy consultation under ESA §7, regarding habitat (a new overwash or breach), that may not contain plovers, that may not even be created by some future event (a coastal storm). FWS would require consultation after *each and every* storm, no matter how devastating, entirely defeating the Emergency Plan's prompt response objective. It is unclear how measures proposed in a lengthy Section 7 consultation would differ from those already included in the Emergency Plan.

4. *Abuses Related to the Fairy Shrimp:* The listing of several species of fly-sized crustaceans known as fairy shrimp (*see* 59 Fed. Reg. 48,136 (Sept. 19, 1994)), have wreaked havoc for property owners in California's Central Valley. Even prior to their final listing, essential utility projects proved no match for the formidable shrimp. For example, the Pacific Gas Transmission Company/ Pacific Gas & Electric (PGT/PG&E) proposed to expand and upgrade an already existing pipeline to satisfy an ever-burgeoning consumer demand for natural gas. The new construction would take place in the right-of-way adjacent to PGT/PG&E's existing pipeline. FWS determined that the pipeline, stretching 845 miles from the Canadian border into California, would impact only 2.34

acres of vernal pools[7] in the Sacramento area. App. 19a-21a. Moreover, FWS admitted it did not know which of the impacted vernal pools actually possessed crustacean populations. It therefore assumed that the shrimp occupied all of the impacted vernal pools. App. 24a. On this simple presumption, FWS held the pipeline construction hostage. To offset any "takes" of the fairy shrimp or its 2.34 acres of habitat, it extorted from PGT/PG&E a 117-acre set aside of ratepayer land. App. 24a-25a.[8]

5. *City of Safford, Arizona: Amicus* City of Safford is a community of 18,000 people located in southeast Arizona. Its primary source of water is Bonita Creek. In January 1993, a major flood struck Safford, severely damaging the Bonita Water System. App. 28a. As soon as flood waters receded, the City secured an engineer to institute emergency repairs to the System. The Federal Emergency Management Agency (FEMA) was on hand to assist with funding.

FWS brought the project to a halt, because Bonita Creek was designated part of the "critical" habitat for the razorback sucker, an endangered fish. *See* 56 Fed. Reg. 54,967 (Oct. 23, 1991). Other federal wildlife officials, however, found that no suckers in fact occupied or could have survived the Creek after the flood. App. 30a. These officials also concluded that the suckers had not adapted to the Bonita Creek environment even under normal con-

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[7] Vernal pools are ephemeral and isolated "bodies" of water that form in shallow land depressions, underlain by a hardpan layer that prevents the downward percolation of water. They fill with rain water in the fall and winter, and either shrink or evaporate in the summer.

[8] At an 11:1 mitigation ration, the required 117 acre set-aside bears no "rough proportionality" to potential impacts that the pipeline's construction would have on 2.34 vernal pool acres. Onerous requirements such as these, made by FWS to prevent hypothetical "takes" of species and habitat, are constitutionally suspect after *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309 (1994).

ditions. Yet, FWS insisted that, to prevent "takes"of the fish and their unoccupied habitat, no repair equipment could enter the stream (for fear of crushing nonexistent suckers); rock filter beds needed to be installed downstream from the construction site (to prevent silt from irritating fish gills); and equipment had to be "diapered" to prevent fluid leaks (even though the equipment itself was not allowed to enter the Creek). FWS's edict to protect absent fish delayed construction repair to the Bonita Water System for six months. During this time all emergency wells were in operation, at a great cost to the City of Safford. The estimated costs of the delays, generated by FWS's implementation of the ESA, is $1,090,620.00.

These scenarios confirm the *amici*'s belief that, as FWS construes its "harm" regulation, it has not cooperatively resolved issues concerning water resources and other public works projects "in concert" with wildlife preservation as mandated under Section 2(c)(2), 16 U.S.C. §1531(c)-(2). There is a dire need to circumscribe the scope of FWS's "harm" regulation. Projects designed to confer far-reaching benefits have been halted because an insect or animal may have inhabited, at some point in the past, a certain parcel of land. Rationality must be interjected into FWS's "harm" regulation. This Court now has that opportunity.

SUMMARY OF ARGUMENT

1. FWS's "harm" regulation is *ultra vires* of the ESA, because it prohibits ordinary land uses and does not restrict the "take" concept, as traditionally defined by common and statutory law, to forceful conduct directed towards individual and identifiable members of listed species.

2. FWS insists its "harm" regulation is precisely phrased to require "actual" death or injury to species. However,

as the regulation is implemented, the agency prohibits ordinary land uses as Section 9 "takes" without any showing of death or injury to species members. Additionally, the textual similarity between the "harm" regulation and the definition of "critical" habitat indicates that FWS considers ordinary land uses as "takes."

3. FWS's "harm" regulation does fundamental injustice to the Act's overall design. It expands Section 9's reach to make Section 7(a)(2)'s proscriptions irrelevant; ignores the difference between "geographical" and "critical" habitat; and deprives nonfederal parties of the procedural protections associated with formal "critical" habitat designations.

ARGUMENT

I.

APART FROM THE PROHIBITION IN §9(a)(1)(B), THE ESA IS REPLETE WITH PROVISIONS SHOWING THAT CONGRESS DID NOT INTEND TO EXPAND "TAKE" BEYOND ITS TRADITIONAL MEANING OF ACTUAL FORCE DIRECTED TO INDIVIDUAL MEMBERS OF WILDLIFE SPECIES.

There is compelling intrinsic evidence in the ESA that Congress intended to restrict the "take" concept to activities that apply force to, and wield control over, specific species members. While the court's opinion below reaches this result emphasizing the text in Section 9(a)(1)(B), other ESA provisions mandate this interpretation as well.

Judge Williams observed that the words accompanying "harm" in Section 3(19) "involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks." Pet. App. 5a-6a. Similarly, Judge Sentelle wrote that all of the verbs associated with "take" in Section 3(19) contemplate behavior that "a specifically acting human does to a spe-

cific individual representative of a wildlife species." Pet. App. 70a.[10] Common law has traditionally prohibited as wildlife "takes" forceful conduct directed towards individual organisms, that has killed, bodily injured or reduced to human possession specific members of species. *See Hughes v. Oklahoma*, 441 U.S. 322, 341-42 (1979) (Rehnquist, J., dissenting); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). The Section 9 "take" prohibition thus rests on firmament dating to Roman and feudal times, where it was illegal to "take" the King's wildlife and hunting was banned wholesale. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (revised and expanded ed.) Praeger 10-11 (1983). As the court below found (Pet. App. 5a-7a), the Section 9(a)(1)(B) prohibition does not stretch "take" beyond its common law meaning.[11] That "take" only encompasses forceful conduct directed towards identifiable organisms is buttressed by these other ESA provisions:

1. ***Section 9(a)(1) Generally***. In ascertaining the scope of "take," Section 9(a)(1) provides the appropriate frame

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[10]This is consistent with the Court's ruling on ESA standing, *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130 (1992). In *Lujan*, the Court denied ESA standing to an environmental organization because its injuries were, *inter alia*, "conjectural [and] hypothetical." *Id.* at 2136 (citations omitted). Judge Williams' reading that "take" requires force directed towards specific and identified species members is similarly designed to insure that FWS does not enforce the "harm" regulation in a manner where an actual kill or injury can only be supposed or conjectured. *See* Pet. App. 6a.

[11]This Court hesitates to rely upon speculative allegations of environmental degradation as a basis to expand well-established principles beyond common law parameters. *E.g., Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 2897-2902 (1992) ("nuisance" restricted to traditional meaning at common law; the concept cannot be interpreted expansively to deprive property owners of just compensation for a Fifth Amendment "taking"). The court below cited *Lucas* persuasively. Pet. App. 3a-4a.

of reference. "Takes," outlawed under subsection (B), are not the only activities prohibited by Section 9(a)(1). Congress also made it unlawful for any person to: import and export listed species (16 U.S.C. §1538(a)(1)(A)); possess, sell, deliver, carry, transport or ship any "taken" species (*id.* §1538(a)(1)(D)); deliver, receive, carry, transport or ship any listed species in interstate or foreign commerce (*id.* §1538(a)(1)(E)); and sell or offer for sale in interstate or foreign commerce any listed species (*id.* §1538(a)(1)(F)). All of these commercial activities require the exercise of dominion over individual species members. Section 9(a)(1)(B) "takes" must not be wrenched from this context. Because FWS's "harm" regulation renders unlawful ordinary land uses that are neither forcefully directed toward, nor reflect the core concept of possession over, specific and identified organisms, it is *ultra vires.*

2. ***Section 7(b)(4)(A)-(B).*** Whenever a federal agency seeks to "carry out" an action, Section 7(a)(2) requires it to "consult" with FWS to insure that such action "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . ." 16 U.S.C. §1536(a)(2). After consultation is completed, Section 7(b)(4) requires the Secretary to provide a "written statement" to the agency, and to any applicant who requires a federal permit from the agency, before the action can be carried out. *Id.* §1536(b)(4). The Secretary can make several conclusions in his written statement: (I) that the "agency action will not violate [Section 7(a)(2)]," whereupon he can propose "reasonable and prudent alternatives" to the proposed federal action so that it will not violate Section 7(a)(2) (*see* 16 U.S.C. §1536(b)(4)(A)); or (II) that the "taking" of an ESA-listed species "incidental to the agency action" will

not violate Section 7(a)(2) (*see* 16 U.S.C. §1536(b)-(4)(B)). Thus, Section 7(b)(4) makes clear that a federal agency can violate Section 7(a)(2) in three distinct ways: by jeopardizing listed species; by destroying or adversely modifying their critical habitat; or by "taking" them in violation of Section 9. Any federal "taking" that complies with the terms and conditions of the Secretary's written statement is not considered a Section 9 violation. 16 U.S.C. §1536(o)(2).

Congress distinguished federal conduct that "takes" species, prohibited by Section 9,[11] with the jeopardy and habitat modification prohibitions contained in Section 7(a)(2). "Take" activity must mean something different from "jeopardy" activity or "adverse[ ] modification of habitat" activity. "Take" cannot mean activity that reduces the likelihood of the species as a whole to survive and recover; these activites are encompassed within "jeopardy."[12] The *only* remaining definition that gives the term "take" individual meaning is activity that exerts intentional, direct and concrete force over discrete members of a larger species class.

Petitioners distinguish the prohibitions in Section 7 from those in Section 9 by acknowledging that "[a] particular action may cause a taking of individual members

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[11] Section 9's prohibitions, including "takes," apply to "any person." 16 U.S.C. §1538(a)(1). This includes federal agencies as well as nonfederal parties. *Id.* §1532(13). Accordingly, the regulation defining the scope of "harm" applies to federal and nonfederal parties alike. Section 7(a)(2)'s prohibitions, however, only address federal conduct.

[12] The ESA does not define "jeopardy." An FWS regulation provides that "jeopardy" activities "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild . . . ." 50 C.F.R. §402.02. The regulation makes clear that "jeopardy" is not aimed at individual members of ESA-listed species, but rather proscribes conduct that affects the species as a whole.

of a listed species, but not adversely affect the species as a whole to such an extent that it violates the 'jeopardy' prohibition or critical habitat restrictions in Section 7(a)-(2)." Pet. Br. 42. This is precisely the point. Section 9 and Section 7(a)(2) encompass different genres of prohibited activity. Section 9's independent purpose is to regulate conduct of nonfederal parties (which is unaffected by Section 7(a)(2)), and to prohibit all parties from "taking" individual, identifiable members of wildlife (which is regulated by neither Section 7(a)(2)'s "jeopardy" nor modification of "critical" habitat restrictions). The challenged regulation, in defining prohibited Section 9 conduct, eradicates this structural difference. *See infra* at 23.

3. ***Section 7(b)(4)(C).*** Another finding the Secretary can make in his post-consultation written statement is that, if a federal action impacts a marine mammal, "the taking is authorized pursuant to" the Marine Mammal Protection Act (MMPA). *See* ESA §7(b)(4)(C), 16 U.S.C. §1536(b)(4)(C). When subsections 7(b)(4)(A) and (C) are read conjunctively, it is again clear that prohibited MMPA "take" activity differs from other prohibited ESA activities that jeopardize species or adversely modify critical habitat. In fact, MMPA "take" *has* been interpreted as limited to "direct" intrusions against specific members of species listed under that act. *See United States v. Hayashi,* 22 F.3d 859, 865 (9th Cir. 1993) (no MMPA "take" where bullets, fired at four porpoises, failed to make bodily contact). Accordingly, the structure of ESA §7(b)-(4) requires that ESA "takes" and MMPA "takes" be construed differently from activities prohibited under Section 7(a)(2). Congress must have intended for "takes" under both Acts to encompass the same conduct, namely, direct action against particular wildlife members.

4. ***Section 10(e).*** The exception for Native Alaskans is another provision in the Act favoring a definition of

"take" as the exercise of force. Section 10(e) exempts Alaskan natives from Section 9's prohibitions where the "taking" is for "subsistence purposes" like food consumption. 16 U.S.C. §1539(e). Native Alaskans can also make "authentic handicrafts and clothing" from the "non-edible by-products of species taken" and sell them in interstate commerce without running afoul of the ESA. *Id.* All of the activities tantamount to an ESA "take" contemplated by Section 10(e) relate to consumptive or commercial uses of individual components of species.

5. ***Section 11(e)(4).*** This section falls within the ESA's enforcement provisions. Subsection (A) provides that all species members "*taken,* possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped or imported . . . shall be subject to forfeiture to the United States." 16 U.S.C. §1540-(e)(4)(A) (emphasis added). This range of conduct, including "take," reflects the common law proscription of control over specific and identifiable wildlife organisms. Likewise, subsection (b) states that "all guns, traps, nets and other equipment . . . used to aid in the *taking,* possessing, selling, [etc.] . . ." of ESA-listed species "shall be subject to forfeiture to the United States." *Id.* §1540(e)(4)(B). The sole purpose of the devices that Congress specified (guns, traps and nets) is to inflict bodily harm on individual members of species or reduce them to human possession. Under FWS's "harm" regulation, however, the plow of the farmer, the hammer of the builder, and the saw of the logger can all be seized by the United States government. Certainly, Congress did not intend for the ESA's provisions to generate such Orwellian results.

To conclude, the ESA's plain language demonstrates Congress' intent regarding the scope of the term "take." Under the *Chevron* "Step One" analysis, if congressional intent can be divined by analyzing the statutory text and

employing "traditional tools" of construction, then that "interpretation must be given effect, and the regulations at issue must be fully consistent with it." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *see Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984). Apart from the prohibition in Section 9(a)(1)(B) and the definition in Section 3(19), the ESA contains repeated textual evidence that the embrace of "take" *is restricted to applications of force, and efforts to dominate, specific organisms that comprise a wildlife species.* FWS's "harm" regulation, however, rejects this evidence. Although the interpretation may be longstanding, it is not entitled to deference. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). As Judge Williams ruled when he denied panel rehearing, the ESA "manifests a clear determination by Congress that the prohibitions in §9 should not reach habitat modifications as defined by [FWS], where there is no direct action by the defendant against any member of the species." Pet. App. 95(a). His analysis is compelling.

II.

FOR ALL PRACTICAL PURPOSES, THE "HARM" REGULATION PROHIBITS HABITAT MODIFICATIONS *PER SE* AS SECTION 9 "TAKES," WITHOUT ANY CONCOMITANT SHOWING OF "ACTUAL" INJURY TO SPECIES.

FWS insists that its "harm" regulation is an exacting work of regulatory craftsmanship, "carefully tailored" to prohibit only "actual" kills and injuries and not bare habitat modifications. Pet. Br. 20. As highlighted earlier (*supra* at 4-12), the implementation of the challenged regulation belies their point. FWS has threatened "take" liability on several of the *amici* merely because a land use modified *potential* habitat. The agency has not required "actual" bodily injuries to a single Delhi Sands flower-

loving fly, a lone striped-garter snake, an identified Piping plover, or an individual razorback sucker. Upon the simple showing of an alteration to these species' potential habitats, the agency finds the recipe for a "take."

Moreover, when Judge Williams denied panel rehearing (Pet. App. 93a), he compared the language of the "harm" regulation to the statutory and regulatory text defining "critical" habitat. Based upon this comparison, he too concluded that, from the practical standpoint of nonfederal property owners, the agency regulates bare land uses as "takes." The challenged regulation states "harm" is "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing *essential behavioral patterns, including breeding, feeding or sheltering.*" 50 C.F.R. §17.3 (emphasis added). ESA §3(5)(A)(i) defines "critical" habitat, *inter alia,* as those land areas "containing physical and *biological features* (I) *essential* to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. §1532(5)(A)(i).[13] FWS lists physical and biological "features" that identify "critical" habitat areas as including: "population growth, food and water resources, shelter, breeding and rearing sites, and habi-

[13] At the point when a species is listed, the Secretary must "concurrently" designate "critical" habitat. ESA §4(a)(3)(A), 16 U.S.C. §1533(a)(3)(A). He can deviate from this rule in only two narrow instances: (1) when he determines it is "essential to the conservation of such species" to implement a final listing rule prior to the time that he has completed work on a critical habitat designation; and (2) where critical habitat for the listed species "is not presently determinable," he may defer critical habitat designation up to a year from the date of listing. ESA §4(b)(6)(C)(i)-(ii), *id.* §1533(b)(6)(C)(i)-(ii). Despite these two limited exception, Congress intended that "[t]he designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances." *Northern Spotted Owl v. Lujan,* 758 F.Supp. 621, 626 W.D. Wash. 1991).

tats that are representative of the historic distribution of the species," 50 C.F.R. §424.12(b).

The definitions of both "harm" and "critical" habitat emphasize "essential" biological "patterns" or "features" that are necessary for any species to survive. Under FWS's regulatory construct, one "harms" species and causes "actual injury" merely by modifying their "critical" habitat, without any showing of death or injury. Judge Williams found as much. *See* Pet. App. 92a. In light of FWS's regulations regarding modifications to "critical" habitat under Section 7, and those habitat modifications referenced in the "harm" regulation and prohibited under Section 9, there is no "substantive, operational difference" between land uses and unlawful "takes." *Id.* The regulation is *ultra vires* for this reason. Congress did not intend Section 9 to encompass ordinary land uses by nonfederal parties.

III.
THE HARM REGULATION IS *ULTRA VIRES* BECAUSE IT UPSETS THE OVERALL STATUTORY DESIGN CONGRESS ENVISIONED WHEN IT STRUCTURED THE ESA.

Apart from the specific textual evidence cited above, the ESA's overall structure makes clear that "take" does not contemplate mere habitat modifications. By defining a single word – "harm" – FWS distorts the entire species preservation regime Congress established.

A. FWS's "harm" regulation impermissibly engrafts onto nonfederal parties the strictly federal responsibility to avoid habitat modifications.

As the D.C. Circuit recognized, "on a specific segment of society, the federal government, the Act imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it

imposes relatively narrow ones." Pet. App. 7a-8a. The "harm" regulation turns this structure on its head. It expands the federal government's Section 7(a)(2) habitat modification restrictions, through the Section 9 "take" prohibition, to bind the activities of nonfederal parties as well.

While conduct of both federal and nonfederal parties is regulated by Section 9 (*see supra* n.11), federal agencies also have the higher and affirmative duty under Section 7 to "conserve" species. 16 U.S.C. §1531(c)(1); *id.* §1536-(a)(1). "Conservation" is an ESA term of art that means "the use of all methods and procedures to bring any endangered species . . . to the point" where it no longer needs the Act's protections. *Id.* §1532(3). The term requires federal agencies to "do far more than merely avoid the elimination of protected species"; rather, they are given an "affirmative duty to increase the population of protected species." *Defenders of Wildlife v. Andrus,* 428 F.Supp. 167, 169 (D.D.C. 1977). *See also Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy,* 898 F.2d 1410, 1416-17 (9th Cir. 1990).

One of the ways in which a federal agency "conserves" species is to insure its actions do not violate Section 7(a)-(2)'s prohibitions, including the direction to avoid destroying or adversely modifying "critical" habitat – that habitat considered essential to the "conservation" of species. 16 U.S.C. §1532(5)(A)(i)). Congress' use of the word "conservation" in defining "critical" habitat was not coincidental. As only federal agencies shoulder the responsibility to "conserve" species, they are also the only entities that must avoid modifying "critical" habitat. Petitioners agree that designated "critical" habitat only impacts federal agencies and does not generally restrict nonfederal actors. *See* Pet. Br. 44. *See also* James Salzman, *Evolution and Application of Critical Habitat Under*

the Endangered Species Act, 14 HARV. ENVT'L L.J. 311, 315 (1990) (hereafter *Evolution of Critical Habitat)* ("critical habitat has legal significance only within the scope of Section 7. It controls only federal action; solely private and state actions are immune from section 7's prohibitions").

Under FWS's "harm" regulation, however, solely nonfederal activity modifying any and all habitat, including "critical," is a prohibited "take." The panel majority found as much. *See* Pet. App. 91a-94a ("harm" regulation imposes on private parties responsibilities that are identical to those imposed on federal agencies under Section 7). Congress did not intend this result. Private parties are not required to "conserve" species, nor are they required to avoid modifying habitat essential to "conservation." FWS unlawfully augments the habitat restrictions that expressly apply only to the federal government in Section 7(a)(2), by prohibiting both federal *and* nonfederal habitat modifications under Section 9. Section 7(a)(2) is thus rendered superfluous. *See* MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 397 (1977) ("if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary") (cited below at Pet. App. 93a).

B. FWS's "harm" regulation places on nonfederal actors species preservation duties that are greater than those imposed on federal agencies, and deprives landowners the procedural protections to which they are entitled under the "critical" habitat provisions.

As shown above, the federal government's duties to avoid adverse habitat modifications expressly extend only so far as "critical" habitat. FWS's "harm" regulation,

however, proscribes nonfederal conduct on *any* and *all* habitat. It places the highest level of species preservation responsibilities on private, state and municipal actors. They are prevented from modifying habitats *wherever* a species *may* be located.

To this end, the agency reads out of the Act the distinctions between mere "geographical" and "critical" habitat. ESA §3(5)(C) succinctly pronounces: "critical habitat shall not include the entire geographical area which can be occupied by the endangered or threatened species." *Id.* §1532(5)(C). *See also* 16 U.S.C. §1532(5)-(A)(i) ("critical" habitat is those "specified areas *within* the geographical area occupied by the species. . . .") (emphasis added).

"Geographical" habitat therefore does not exhibit the same characteristics as "critical" habitat. It is not essential to species conservation; it does not play a decisive role to insure that breeding, feeding, and sheltering patterns are met; and it does not warrant "special management considerations or protection." *See supra* at 20. While individual members of species that live on "geographical" habitat must be protected, the land itself, unlike "critical" habitat, is not the subject of any heightened protections under Section 7(a)(2). Likewise, there is no indication that Congress afforded exalted status to "geographical" habitat in the Section 9 "take" prohibition.

The subject regulation entirely ignores the ESA's habitat hierarchy. In fact, under FWS's regulation, merely "geographical" habitat is the illogical recipient of greater protections than "critical" habitat. While "critical" habitat designations proscribe only federal conduct, the "harm" regulation prohibits activities of federal, state, municipal *and* private actors on "geographical" habitat.

FWS may find the difference between "critical" and "geographical" habitat inconsequential. The practical difference to nonfederal landowners, however, cannot be overstated. In the "critical" habitat context, the ESA contains an elaborate mechanism to alert landowners as to what activities, on what land, may be restricted. To wit: when the Secretary designates or revises "critical" habitat,[14] Section 4(b)(4) mandates him to first conduct public notice and comment rulemaking proceedings pursuant to the Administrative Procedure Act (APA). 16 U.S.C. §1533(b)(4). General notice of any *proposed* regulation designating or revising critical habitat must be published in the Federal Register, and a public hearing must be held upon the request of any person made within 45 days after proposed rule publication. *Id.* §1533(b)(5)(A)(i), (E). At this point, public participation is crucial from the perspective of property owners; they have the opportunity to present salient cost-benefit information, and the Secretary must consider the economic impacts of his "critical" habitat designations. *Id.* §1533(b)(2).[14] *See Evolution of Critical Habitat,* 14 HARV. ENVT'L L.J. at 320 (addition by the ESA's 1978 Amendments of the "cost benefit analysis" in critical habitat designations "changed the process from a purely biological assessment to a social policy decision").

The ESA's public notice mechanism does not end here. Within one year after publication of the proposed rule, the Secretary must then publish in the Federal Register a *final* rule regarding critical habitat designations or revisions. 16 U.S.C. §1533(b)(6)(A)(i)(I). In the final rule, the Secretary must describe and evaluate "those activities (whether public or private) which . . . if undertaken may adversely modify [critical] habitat, or may be affected by [its] designation." ESA §4(b)(8), 16 U.S.C. §1533(b)(8).

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[14] *See supra* note 13.

FWS's "harm" regulation under Section 9 does an end-run around the formal public participation scheme constructed by Congress. Landowners are left entirely to the whims of FWS regarding whether their parcels are even considered mere "geographical" habitat. They do not know up-front, at the time a species is listed, what land uses on the "geographical" habitat they own will constitute a "take." Unlike "critical" habitat areas, owners of "geographical" habitat are not given the benefits of a statement from the Secretary of the Interior, explaining and describing what land uses will not be actionable under the ESA.

A recent report from the General Accounting Office states that 781 plant and animal species are listed in the United States, and only 105, or less than 24%, have designated "critical" habitat. *See* General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4, 6 (December 1994). Therefore, in the vast majority of situations, nonfederal landowners who own "geographical" habitat receive none of the notice associated with "critical" habitat designations. The rule of "concurrent" critical habitat designations has become a meaningless mandate. *See supra* note 13.

The examples we cite (*supra* at 4-12) demonstrate the practical impact of FWS's failure to meet its duty here. Significant public resource projects have been delayed because FWS insists on regulating any "geographical" area that may possibly contain the Delhi Sands flower-loving fly, the Foothill yellow legged frog or the Oblivious tiger beetle. Every storm that strikes the unnourished beaches of Fire Island and erodes its dunes leaves homes vulnerable to destruction, because beach replenishment can potentially have unspecified impact on the piping plover. In none of these cases has FWS indicated when it will designate the critical habitats for these spe-

cies and afford landowners with the process and notice Congress intended.

To conclude, FWS misuses its "harm" regulation as a "back-door" substitute for designating "critical" habitat. It construes as "harm" land uses on *all* habitat, rendering them *all* illegal "takes." For these reasons, the "harm" regulation is *ultra vires* of the ESA.

C. A determination by this Court that the "take" prohibition does not include habitat modifications is necessary to place realistic parameters around the Section 5 land acquisition mechanism.

Another mechanism for the federal goverment to satisfy its "conservation" obligations is contained in Section 5(a)(2). It provides that the Secretary "shall establish and implement a program to *conserve* wildlife," and, to this end, he "is authorized to acquire by purchase . . . lands, waters or interest therein . . . ." 16 U.S.C. §1534-(a)(2). *See* Pet. App. 7a-8a.

Petitioners' *amici* Scientists make the point that the land acquisition mechanism is an infrequently used device. *See* Sci.Am. Br. 18-19. Just because the Secretary rarely employs his authority here does not warrant relegating Section 5 to minor status. In this age of budgetary austerity, the *amici* Scientists cannot expect the Secretary to purchase occupied and unoccupied, "geographical" and "critical," habitat of all endangered and threatened species. Rather, the Secretary should devote his limited financial resources to purchase only habitat that is "essential" to species conservation – namely, "critical" habitat. The focus of the Secretary's efforts can be narrowed even further. Federal agencies are already restricted by the habitat modification prohibition in Section 7(a)(2). The Secretary can concentrate on purchasing "critical" habitat, occupied by species, which has no federal nexus

and is strictly privately or state-owned. A sensible triage approach can be applied to the Section 5 land acquisition mechanism, upon this Court's confirmation that habitat modifications are not encompassed within Section 9.

IV.

THIS COURT'S RULING IN *TVA v. HILL* IS FULLY CONSISTENT WITH THE CONCLUSION THAT "TAKE" DOES NOT SUBSUME MERE HABITAT MODIFICATIONS THAT UNINTENTIONALLY KILL OR INJURE SPECIES.

The Court's seminal ruling on the ESA to date, *TVA v. Hill,* 437 U.S. 153 (1978), fully comports with the conclusion that "take" does not encompass habitat modifications. While Petitioner highlights that the Court "cited the 'harm' regulation approvingly" (Pet. Br. 16), it is also abundantly clear that the situation confronting this Court fell within the narrow confines of Section 7(a)(2)'s "critical" habitat prohibition. The major premise coloring the entire opinion was that, if the Tellico Dam's gates were opened, a *federal agency would have destroyed the entire "critical" habitat of the endangered snail darter:*

> We began with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters *or destroy their critical habitat.*

437 U.S. at 171 (emphasis added).

The Court appreciated the significance of "critical" habitat. It found that, if TVA's planned operation of the Dam were permitted, the agency would have violated its obligations under Section 7. 437 U.S. at 173-74. It also expressed in *dicta* that TVA's same activities would have "harmed" the snail darter and resulted in a Section 9 "take." *Id.* at 184-85 n.30. Thus, the result in *TVA v. Hill* confirms the now well-established precept that federal agencies have a strict responsibility to avoid destroying or adversely modifying "critical" habitat under Sec-

tion 7(a)(2). Petitioner and its *amici* gloss over the significant fact that *TVA v. Hill* addressed a species even rarer than an endangered one – namely, an endangered species with a critical habitat designation. *See supra* at 26. From this unique scenario, they misinterpret and expand the decision's reach to prohibit *nonfederal* land use modifying *any* habitat as a "take" under Section 9.[15]

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[15] Significantly, the other case that Petitioner emphasizes, and that troubled former Chief Judge Mikva (Pet. App. 27a), also arose in the rare context of a "critical" habitat designation. In *Palila v. Hawaii Dep't of Land and Natural Resources (Palila I)*, 639 F.2d 495 (9th Cir. 1981) and *Palila II*, 852 F.2d 1106 (9th Cir. 1988), the Ninth Circuit found that the state's game management program resulted in "takes" of the Palila bird, which could be "found only on the slopes of Mauna Kea on the Island of Hawaii." 852 F.2d at 1107. The court found a violation of the FWS's "harm" regulation because the habitat modification there adversely affected "critical" habitat, which would have been designated with attendant procedural protections. *See* 852 F.2d at 1107; 639 F.2d at 495. However, we question the *Palila* rulings to the extent they apply the ESA's "critical" habitat prohibitions to nonfederal parties, in these cases a state agency. *See* J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1410 n.94 (1991) (criticizing *Palila* decisions as "unusual in that the courts found a prohibited take had occurred even though no federal action was involved to invoke the section 7 prohibition on adverse modification of critical habitat").

CONCLUSION

For the foregoing reasons, the Court should find FWS's "harm" regulation *ultra vires* of the Endangered Species Act because (1) the term "take" as it is used throughout the Act strictly contemplates activities that are forcefully directed to individual species members; and (2) prohibiting habitat modifications carried out by non-federal parties will upset the careful species preservation regime designed by Congress, and read key distinctions out of the Act.

Respectfully submitted,

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March 24, 1995

APPENDIX A

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Field Office
2730 Loker Avenue West
Carlsbad, California 92008

November 4, 1994

Mr. Leon Long
West San Bernardino County Water District
855 West Base Line, P.O. Box 920
Rialto, CA 92377-0920

Re: Construction of proposed Well #41 and #42 sites

Dear Mr. Long:

The Fish and Wildlife Service (Service) is in receipt of your letter dated September 29, 1994, and is responding to your request for approval and/or comments regarding the construction of the above referenced sites.

The project as proposed for Well #41, located adjacent to the east side of the Agua Manza Cemetery in the City of Colton, includes construction of the well site and associated facilities. The project as proposed for Well #42, located south of San Bernardino Avenue near the intersection of Riverside and San Bernardino Avenues in the City of Rialto, includes the construction of the electrical service and waterline to the existing 80' x 120' well site area. The well site will require some grading so the district can construct a security fence for the protection of their equipment.

At issue is the potential effect of the proposed projects on the federally listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*; DSF). Several factors relating to habitat loss and destruction, including urbanization, agricultural activities, sand mining activities, illegal dumping, off-road vehicles, and invasion of non-native plants, have been identified as threats to the continued survival of the DSF. Due to the imminent danger of extinction, the Service listed the DSF as endangered on September 18, 1993. As a federally listed species, the DSF is afforded all the protections of the Endangered Species Act of 1973, as amended (Act).

The current policy of the Service is to consider all areas on Delhi Sands with suitable DSF habitat as occupied, and disturbance of this habitat to be a potential violation pursuant to Section 9 unless authorized pursuant to Section 7, or Section 10 of the Act. Section 9 of the Act specifically prohibits 'take' of listed species. The Act defines 'take' as follows: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct." Take is further defined in 50 C.F.R. chapter 1, part 17.3 through the definition of harass and harm as follows: "Harass in the definition of 'take' means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential

behavioral patterns, including breeding, feeding or sheltering."

As you are aware, the Service has been discussing the proposed well sites with West San Bernardino County Water District since February 1994. At that time we informed you that more information was necessary to determine the potential project-related impacts to the DSF. Surveys conducted by the Service this past summer and further consultation with local entomologists have resulted in additional information regarding the distribution and habitat suitability of the DSF in the vicinity of the proposed project areas. No DSF were observed at either site during 1994. The habitat on well site #41 was determined to be of low suitability for the DSF due to the high level of disturbance on the property. The habitat on the well #42 site, however, was evaluated as medium to high quality and furthermore, is part of a previously recorded DSF occupied site.

Therefore, the Service determines that take can be avoided on well site #41 provided that appropriate avoidance measures are implemented. The latter are necessary because it was determined that there is suitable habitat nearby the site. These avoidance measures shall include that: 1) construction activities are restricted to the 100' x 100' well site; 2) no spoil material will be stored in adjacent open space areas; 3) Access routes that assure avoidance will be identified by the District with the assistance of a Service biologist; and 4) restoration of the parcel "B" easement with native species typical to the area. The Service does not object to the District proceeding with the proposed well site #41 project, provided that these avoidance measures are implemented.

The Service considers that activities associated with well site #42 will likely result in take of the DSF, based on

the information the Service has obtained to date. As stated above, incidental take associated with habitat disturbance requires authorization under section 10(a) of the Act. The Service recommends that the District submit a 10(a)(1)(B) application package (see enclosure). Once the application is submitted, the target time horizon for the Service to issue a 10(a) incidental take permit for a project of this size is within 90 days. Given this time frame, it may be premature for the District to proceed with awarding a contract for this project.

The Service is available to assist the District and its consultant in the preparation of a 10(a) permit and habitat conservation plan that provides for the conservation of the Delhi Sands flower-loving fly. We also encourage the District's permit application to address other future projects if appropriate. This might save both agencies a great deal of time and expense in the future.

This approach also benefits the long-term conservation planning for the DSF. If we can be of any further assistance or if you have question regarding these comments please contact Jeff Newman of this office at (619) 431-9440.

Sincerely,

/s/ [Illegible]
for
Gail C. Kobetich
Field Supervisor

#1-6-95-HC-022

Enclosure

cc: Fred Worthley, CDFG
Larry Eng, CDFG
Bill Tippets, CDFG

APPENDIX B

INLAND ACTION INC.

[LOGO]

IMPACTS OF MITIGATION
for the
ENDANGERED DELHI SANDS
FLOWER LOVING FLY
on the
SAN BERNARDINO COUNTY MEDICAL CENTER

Prepared by:

INLAND ACTION INC.
Seventh Street
Building 759, Suite 52
San Bernardino, California 92408

Stephen T. Lilburn
Environmental Co-Chairman

OCTOBER 1994

* * *

ABSTRACT

The Endangered Species Act (ESA) as applied to the construction of the San Bernardino County Medical Center resulted in an expenditure of $3,310,199 to mitigate for the presence of eight (8) Delhi Sands Flower-Loving Flies. The effort as negotiated with the U.S. Fish and Wildlife Service and California Department of Fish and

Game resulted in moving and redesigning the facility to provide 1.92 acres of protected habitat for eight flies believed to occupy the site. The effort mitigates only for species on site. Cost per fly amounted to $413,774.25 and resulted in a one year construction delay. This cost is equivalent to the average cost of treatment of 494 inpatients or 23,644 outpatients.

* * *

APPENDIX C

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Service
Carlsbad Field Office
2730 Loker Avenue West
Carlsbad, California 92008

December 13, 1994

Colonel Michal Robinson
District Engineer
Los Angeles District
U.S. Army Corps of Engineers
P.O. Box 2711
Los Angeles, CA 90053-2325

Att: Aaron Allen, Regulatory Branch

RE: San Gabriel Canyon Sediment Management Plan Meeting

Dear Colonel Robinson:

The U.S. Fish and Wildlife Service (Service) met with representatives from the Army Corps of Engineers (Corps), Los Angeles County Department of Public Works (LACDPW), California Department of Fish and Game (CDFG) and consultants from Engineering Science on November 3, 1994 to discuss the significant and adverse impacts the could result from the implementation of the above referenced project. A number of issues were discussed, including the proposed alternatives, mitiga-

tion plans, contaminants, baseline conditions, and possible section 7 consultation for listed or conference for proposed species.

The Service previously reviewed and provided letters of comment, dated September 30, 1994 (draft comments), March 11, 1994, October 5, 1993, and April 5, 1993 on the referenced project. The Department of the Interior (Interior) also provided comments on November 7, 1994 on the referenced project. These letters documented that the proposed project could have unacceptable adverse impacts to fish and wildlife resources and their habitat. The project as currently proposed will result in the direct and indirect loss of aquatic and riparian habitat, native fish and wildlife populations, and decreased water quality. The Service also determined that the draft environmental impact statement prepared for the project was incomplete and inadequate.

There are a number of issues that the Corps and LACDPW need to address in greater detail before proceeding with any of the project alternatives or considering new actions. These issues include: 1) there may be evidence of a viable populations of the Federal category 2 candidate southwestern pond turtles (*Clemmys marmorata pallida*; pond turtle), two-striped garter snake (*Thamnophis hammondii*; garter snake), the Federally proposed endangered arroyo southwestern toads (*Bufo microscaphus californicus*; arroyo toad), and the Federally listed endangered Slender-horned spineflower (*Dodecahema leptoceras*; spineflower); 2) the recent petition for the Service to list the Santa Ana spackled dace (*Rhinichthys osculus*; speckled dace) and Santa Ana sucker (*Catostomus santaanae*) as threatened or endangered. In addition, since submittal of the above refer-

enced letters the Service has listed the Arroyo chub (*Gila ocrutti*) as a Federal category 2 candidate species.

The Service is adamant about the need for current comprehensive surveys of the San Gabriel Watershed. The last surveys of the area were done in the winter of 1992, when many of the sensitive plants and animals were not physically or visually present. Since the last surveys were completed a number of species are being considered for Federal listing or have been formally proposed as a listed species. We have enclosed an updated species list which includes species that may occur in the vicinity of the project site. This list should be provided to LACDPW as well as Engineering Science as a basis for assembling a team of biologists with specific knowledge and ability to identify the species delineated on the list. Until the Service has received the survey results, we will not be able to assist the Corps or LACDPW in determining the least damaging alternatives or assist in developing appropriate mitigation to offset any losses. If listed species may be impacted by the proposed project consultation under Section 7 of the Endangered Species Act will be necessary. The Service recommends that the Corps conference with our agency on all proposed threatened or endangered species.

The Service will discuss the Flow Assisted Sediment Transfer (FAST) alternative from Cogswell to San Gabriel Reservoir (San Gabriel) upon completion of biological surveys that can document the degree of impact associated with this method. We are concerned that the FAST method could impact the West Fork of the river, the most biologically diverse and sensitive portion of the river system. Species that could be impacted by the FAST method include the speckled dace Santa Ana sucker, pond turtle, garter snake, arroyo chub, arroyo

toad, and spineflower. High quality riparian habitat also exists along the banks of the West Fork and could be impacted by the FAST method. The Service needs more scientific evidence that conclusively proves that the FAST method is the least damaging and practical method. The Service is also interested in more information about other sediment removal alternatives (i.e. trucking or dredging) from Cogswell.

The Service is also willing to discuss the proposed alternative for sediment removal from San Gabriel to Morris Reservoir (Morris). This alternative calls for the construction of an earthen sluice channel to facilitate sediment removal. As stated in the Interior comment letters, dated November 7, 1994, and the Service letter, dated September 30, 1994, more information about the sluice channels design, construction, and possible associated impacts need to be provided to the Service before the we can adequately address this alternative.

The proposed alternative to sluice from Morris to the disposal site is unacceptable and mitigation for the loss of biological resources for an approximate 7 mile reach would be infeasible. The Service and CDFG agree that the sluice alternative from Morris is unequivocally the most destructive sediment removal method and that LACDPW must consider other less damaging alternatives.

The Service believes mitigation involving the relocation of viable populations of any species in inappropriate. Relocation mitigation has been proposed for a number of species that could be impacted by the proposed project. The Service is mainly concerned with the proposed relocation of the southwestern pond turtle and the two-striped garter snake. The proposed relocation site for the pond turtle and two-striped garter snakes is the North Fork of the San Gabriel River. The North

Fork of the San Gabriel River is an area highly used by the homeless and is regularly disturbed by off-road vehicle activity and may not be a suitable site for relocation. There are no known populations or current records of pond turtles or two-striped garter snakes inhabiting the North Fork.

The Service thanks you for the opportunity comment on this complex project. Please send all future documents, survey and study results, meeting notices, and pertinent data concerning this project to our attention. Please notify the Service on how you intend to proceed with this project. If you should have any questions pertaining to these comments, please contact Shawnetta Grandberry at (619)-431-9440.

Sincerely,

/s/ [Illegible]
for
Gail C. Kobetich
Field Supervisor

#1-6-95-SP-064

cc: CDFG, San Diego, CA (Attn: Bill Tippets and Tim Dillingham)
CDFG, Long Beach, CA (Attn: Mike Giusti)
EPA, San Francisco, CA (Attn: Harriet Hill)
LACDPW, Alhambra, CA (Attn: Sree Kumer)
Engineering Science, Pasadena, CA (Attn: Jeff Galizio)
Bobby Goodman, Upland, CA

Listed Endangered, Threatened and Candidate Species that May Occur in the Area of the San Gabriel Canyon Sediment Removal Project, Los Angeles County, California (1-6-95-SP-064)

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Listed Species		
BIRDS		
Bald eagle	*Haliaeetus leucocephalus*	E
least Bell's vireo	*Vireo bellii pusillus*	E
Peregrine falcon	*Falco peregrinus*	E
coastal California gnatcatcher	*Polioptila californica californica*	T
Western snowy plover (coastal population)	*Charadrius alexandrinus nivosus*	T
PLANTS		
Slender-horned spineflower	*Dodecahema leptoceras*	E
Gambel's watercress	*Rorippa gambellii*	E
Proposed Species		
AMPHIBIANS		
Southwestern Arroyo toad	*Bufo microscaphus californicus*	PE

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
BIRDS		
Southwestern willow flycatcher	*Empidonax traillii extimus*	PE
PLANTS		
Braunton's milk-vetch	*Astragalus brauntonii*	PE
Candidate Species		
AMPHIBIANS		
Foothill yellow-legged frog	*Rana boylii*	C2
Mountain yellow-legged frog	*Rana muscosa*	C2
Western spadefoot toad	*Scaphiopus hammondii*	C2
BIRDS		
Bell's sage sparrow	*Amphispiza bellii bellii*	C2
California spotted owl	*Strix occidentalis occidentalis*	C2
Ferruginous hawk	*Buteo regalis*	C2
Southern California rufous-crowned sparrow	*Aimophilia ruficeps canescens*	C2
Tricolored blackbird	*Agelaius tricolor*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Western burrowing owl	*Athene cunicularia hypogaeae*	C2
White-faced ibis	*Flegadis chihi*	C2
California horned lark	*Eremophilia alpestris actia*	C3c
FISH		
Arroyo chub	*Gila orcutti*	C2
Santa Ana speckled dace	*Rhinichthys osculus* ssp.	C2
Santa Ana sucker	*Catastomus santaanae*	C2
INSECTS		
Oblivious tiger beetle	*Cicindela latesignata obliviosa*	C2
San Gabriel Mountains blue butterfly	*Plebejus saepiolus* ssp.	C2
San Gabriel Mountains elfin butterfly	*Incisalia mossii* ssp.	C2
Wandering (Salt marsh) skipper	*Panoquina errans*	C2
MAMMALS		
California leaf-nosed bat	*Macrotus californicus*	C2
Greater western mastiff-bat	*Eumops perotis californicus*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Long-legged myotis	*Myotis volans*	C2
Los Angeles pocket mouse	*Perognathus longimembris brevinasus*	C2
Northwestern San Diego pocket mouse	*Perognathus [-chaetodipus] fallax fallax*	C2
San Diego black-tailed jackrabbit	*Lepus californicus bennettii*	C2
San Diego desert woodrat	*Neotoma lepida intermedia*	C2
Southern grasshopper mouse	*Onychomys torridus ramona*	C2
Spotted bat	*Euderma maculatum*	C2
REPTILES		
Coast patch-nosed snake	*Salvadora hexalepis virgultea*	C2
Coastal rosy boa	*Lichanura trivirgata rosafusca*	C2
Coastal western whiptail	*Cnemidorphorus tigris multiscutatus*	C2
San Bernardino ringneck snake	*Diadophis punctatus modestus*	C2
San Diego banded gecko	*Coleonyx variegatus abbotti*	C2
San Diego horned lizard	*Phrynosoma coronatum blainevillei*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Southwestern pond turtle	*Clemmys marmorata pallida*	C2
Two-striped garter snake	*Thamnophis hammondii*	C2
PLANTS		
Nevin's barberry	*Berberis nevinii*	C1
Thread-leaved Brodiaea	*Brodiaea filifolia*	C1
San Gabriel Mountains Dudleya	*Dudleya densiflora*	C1
San Gabriel Mountains manzanita	*Arctostaphylos gabrielensis*	C2
Slender mariposa lily	*Calochortus clavatus* var. *gracilis*	C2
Plummer's mariposa lily	*Calochortus plummerae*	C2
San Fernando Valley Chorizanthe	*Chorizanthe parryi* var. *fernandina*	C2
Parry's spineflower	*Chorizanthe parryii* var. *parryi*	C2
San Gabriel River Dudleya	*Dudleya cymosa* ssp. *crebifolia*	C2
Many-stemmed (-dudleya) live-forever	*Dudleya multicaulis*	C2
San Gabriel bedstraw	*Galium grande*	C2

COMMON NAME	*SCIENTIFIC NAME*	*STATUS*
Palmer's grappling-hook	*Harpagonella palmeri* var. *palmeri*	C2
Smooth spikeweed	*Hemizonia pungens* ssp. *laevis*	C2
Coulter's salt-marsh daisy	*Lasthenia glabrata* ssp. *coulteri*	C2
Humboldt lily	*Lilium humboldtii* var. *ocellatum*	C2
Lemon lily	*Lilium parryi*	C2
Davidson's bush mallow	*Malacothamnus davidsonii*	C2
Gairdner's yampah	*Perideridia gairdneri* ssp. *gairdneri*	C2
Parish's gooseberry	*Ribes divaricatum* var. *parishii*	C2
Los Angeles sunflower	*Helianthus nuttallii* ssp. *parishii*	C2*

E: Endangered
T: Threatened
PE: Proposed Endangered
PT: Proposed Threatened
C1: Category "1" candidate for listing; taxa for which the Service has substantial information to support listing as threatened or endangered.

C2: Category "2" candidate for listing; taxa that may warrant listing but for which substantial information to support a proposed rule is lacking.

C3: Taxa that are not currently being considered for listing as threatened or endangered:

(3a): taxa for which the Service has persuasive evidence of extinction. However, any such taxon is certain to get high priority for listing if rediscovered.

(3b): taxa that currently do not meet the Act's definition of "species". Any such taxon could be reevaluated in the future as a result of subsequent research.

(3c): taxa that apparently more common than previously thought and thus not under current consideration for listing as threatened or endangered.

*: _ May be extirpated.

APPENDIX D

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services
Sacramento Field Office
2800 Cottage Way, Room E-1823
Sacramento, California 95825-1846

April 12, 1993

In Reply Refer To:
1-1-93-C-20

Mr. Kevin P. Madden
Office of Pipeline and Producer Regulation
Federal Energy Regulation Commission
825 North Capitol Street, N.E., Room 7000B
Washington, D.C. 20426

Subject: Section 7 Conference on Section 4B of the Pacific Gas Transmission Company Pipeline (OPR/DEMEA/ECB, Docket No. CP89-460-000, Pacific Gas Transmission Company)

Dear Mr. Madden:

This responds to your request, dated January 15, 1993, to initiate a conference on a proposal to authorize the construction by the Pacific Gas Transmission Company of Section 4B of the Pacific Gas Transmission Company (PGT)/Pacific Gas and Electric (PG&E) pipeline in Tehama and Glenn Counties, California. At issue are the effects of the proposed construction on the proposed endangered vernal pool fairy shrimp (*Branchinecta lynchi*). This animal was proposed as an endangered species on May 8, 1992 (57 Federal Register 19856). Your request

for conference was received by this office on January 19, 1993. This conference is based on the letter from your office dated January 15, 1993; the mitigation plan prepared by the permittee, dated February 25, 1993; a meeting between Mike Sotak of PG&E, William Van Peters and Allison Jones of Bechtel, Jamie King of the University of California, Rick Brusca of the San Diego Museum of Natural History, Marie Simovich of the University of San Diego, and Jim Browning and Chris Nagano of my staff on December 14, 1992; a meeting between Mike Sotak, William Van Peters, Allison Jones, Jim Browning and Chris Nagano on December 30, 1992; a meeting between Mike Sotak, Allison Jones, Jamie King of the University of California, Jim Browning and Chris Nagano on January 27, 1993; a meeting between Mike Sotak, Allison Jones, Jim Browning and Chris Nagano on February 24, 1993; and several telephone conversations between Mike Sotak, Allison Jones, Jim Browning and Chris Nagano between December 14, 1992 and February 26, 1993.

Conference Opinion

It is our conference opinion that the authorization of the construction of Section 4B the PGT/PG&E pipeline in Tehama and Glenn Counties, California, as proposed, is not likely to jeopardize the continued existence of the proposed endangered vernal pool fairy shrimp. Critical habitat has not been proposed for this species; therefore, none shall be affected.

Description of the Proposed Action

In brief, the Pacific Gas Transmission Company and Pacific Gas and Electric Company propose to construct approximately 845 miles of pipeline from the Canada-

United States border at Kingsgate, British Columbia to the Panoche meter station in Fresno County, California. The pipeline will pass through the states of Idaho, Washington, Oregon, and California. The proposed pipeline would be generally parallel to an existing line constructed in the early 1960's. There are 26.4 miles of Section 4B that will impact five vernal pool complexes containing the vernal pool fairy shrimp. The five sites consist of Sacramento Valley hardpan vernal pools, although northern Sacramento Valley volcanic mudflow vernal pools also are found at Truckee Creek. During field review of this project, 113 vernal pools totaling 2.34 acres were located on the PGT/PG&E Right of Way (ROW). The project, as proposed, would result in the loss of all of these vernal pools. Varying numbers of vernal pools at the five locations were sampled for fairy shrimp with the percentage of pools containing the vernal pool fairy shrimp ranging from 60% to 100% (Table 1 of the Plan).

Please refer to the following documents for a detailed description of the proposed project: 1) *Vernal Pool Plan* prepared by Pacific Gas Transmission Company, Pacific Gas and Electric Company, and Bechtel Corporation, and dated January 1992; and 2) *Branchinecta lynchi Mitigation and Monitoring Plan* (Plan), prepared by the PGT-PG&E Pipeline Expansion Project, and dated February 24, 1993.

To offset adverse impacts to the vernal pool fairy shrimp and its habitat, the project includes a mitigation plan. This plan includes the following provisions (summarized from the Plan):

1. Acquire fee title for 117 acres of vernal pool mitigation habitat containing the vernal pool fairy shrimp.

2. Replace with no net loss of acreage vernal pools in the five vernal pool areas with the vernal pool fairy shrimp.
3. Conduct a worker education program to all field personnel on the importance of protecting vernal pool fairy shrimp habitat.
4. Complete a monitoring plan to evaluate the success of the on-right-of-way vernal pool restoration plan for the vernal pool fairy shrimp.
5. At the end of five years the restoration of the vernal pool fairy shrimp will be considered successful if this species is present and the densities of each of the dominant aquatic invertebrates (maximum of ten species) are present within one standard deviation of the mean of these values for undisturbed pools, adjusted by a factor for the difference between preconstruction on-right-of-way pools and undisturbed off-right-of-way pools.

Species Account/Environmental Baseline

Descriptions of the vernal pool fairy shrimp and information on this species are found in Federal Register 19856-19862, the publication of the proposed rule to list this species as endangered. This crustacean is restricted to vernal pools and swales in California. The vernal pool fairy shrimp has been most commonly observed in grass or mud bottomed swales, earth sump, or basalt flow depression pools. The Plan, Eng *et al.* (1990), and Simovich *et al.* (1992) provide further details on the life history and ecology of the vernal pool fairy shrimp.

Data from the field survey described in the biological assessment indicate that 2.34 acres of vernal pools that are known or are likely to be inhabited by the vernal

pool fairy shrimp occur in the project area. All of these vernal pools would be adversely affected by the proposed project's construction.

Effects of the Action

According to the Plan, 2.34 acres of vernal pools would be lost during construction at the site. Based on the available information, the Service anticipates that all vernal pool fairy shrimp inhabiting 2.34 acres of vernal pools would be lost as a result of project construction. This action is expected to adversely impact the proposed endangered vernal pool fairy shrimp. Full implementation of the Plan would offset adverse impacts to the vernal pool fairy shrimp and its habitat so that the project will not appreciably reduce the likelihood of its survival and recovery.

Cumulative Effects

Cumulative effects are those impacts of future State, local, and private actions affecting endangered and threatened species that are reasonably certain to occur in the action area. This area in Tehama and Glenn Counties is subject to a number of anthropogenic actions, such as rock collecting grazing by cattle, and off-road vehicle use. However, actions of which we are aware at this time together with those addressed in this conference are not expected to appreciably reduce the likelihood of the survival and recovery of the vernal pool fairy shrimp.

Incidental Take

Although the provisions of section 9 of the Act are not applicable to proposed species, specification of conditions on the incidental taking of the vernal pool

fairy shrimp in this conference is intended to provide a basis for compliance with sections 7(b)(4) and 7(o)(2) of the Act. Thus, the terms and conditions set forth below governing incidental take associated with the project are intended to satisfy the requirements of sections 7(b)(4) and 7(o)(2) in the event the vernal pool fairy shrimp becomes listed.

Proposed project actions that may result in the death or injury of the proposed endangered species have been previously discussed in this conference. Loss of vernal pool habitat would be confined to the project boundaries. It is difficult to estimate the number of vernal pool fairy shrimp inhabiting each vernal pool. Because we do not know which of the vernal pools that will be impacted by the proposed project are inhabited by the vernal pool fairy shrimp, we are unable at the present time to precisely determine the number of animals that inhabit each pool. For these reasons, we present the estimate of incidental take of the vernal pool fairy shrimp in terms of the number of vernal pools that will be lost. Based on the available information, the Service anticipates that all vernal pool fairy shrimp inhabiting 2.34 acres of vernal pools would be lost as a result of project construction.

We believe the following measures are required to minimize the impacts of incidental take on the vernal pool fairy shrimp:

1. All vernal pool fairy shrimp habitat adjacent to the project site should be avoided during and following construction.

2. The permittee should acquire fee title for compensation habitat for the vernal pool fairy shrimp.

   a. Within twelve (12) months of the date of this conference, the permittee should acquire fee-title

for one hundred and seventeen (117) acres of vernal pool fairy shrimp habitat, as described in the Plan. The lands acquired should be acceptable to the Service. The fee-title should be given to an acceptable resource agency or conservation organization such as The Nature Conservancy or the Center for Natural Lands Management.

b. Conference should be reinitiated with the Service if 117 acres of vernal pool fairy shrimp habitat that is acceptable to the Service is not acquired within 12 months from the date of this document.

3. The permittee should undertake the following to confine loss of the vernal pool fairy shrimp to the project site:

a. All mitigation and monitoring measures described in the Plan should be fully implemented.

b. Biologists and law enforcement personnel from the California Department of Fish and Game and the Service should be given complete access to spread 4B of the Pacific Gas Transmission Company Pipeline project to monitor construction and mitigation activities. Personnel from both these agencies shall be given complete access to the site to monitor the vernal pool fairy shrimp and its habit in perpetuity.

c. Conference or formal consultation, as appropriate, should be reinitiated five years from the date that construction is initiated on spread 4B if the mitigation is not successful, as described in the Plan.

The Services should be notified within 3 working days of the finding of any dead vernal pool fairy shrimp. The Service contact persons for this information are

Chris Nagano and Jim Browning (916/978-4866). Any vernal pool fairy shrimp found injured or dead should be deposited in the San Diego Museum of Natural History. The agency contact is Dr. Rick Brusca (619/232-3821).

Conservation Recommendations

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. The term "conservation recommendations" has been defined as suggestions from the service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information. Measures generally recommended have been incorporated into the mitigation plan for the proposed project. We do not have any conservation recommendations for the proposed project at this time.

This concludes conference on work described in the vernal pool plan, and the Plan. Reinitiation of formal conference should be requested if new information reveals effects of the actions that may affect the species in a manner that was not considered in this conference. The Federal Regulatory Energy Commission (FERC) should request the Service to adopt this conference as a biological opinion pursuant to 50 CFR §402.10(d) if the vernal pool fairy shrimp is listed under the Act. Initiation of formal consultation should be initiated by FERC if the animal is listed and new information reveals effects of the actions may affect the species or critical habitat in a manner that was not considered in this conference, and/or if other species are listed or critical

habitat designated that may be affected by the action. If you have any questions regarding this opinion, please contact Chris Nagano or Jim Browning of my staff at the letterhead address or at 916/978-4866.

Sincerely

/s/ James D. Carson
for Wayne S. White
Field Supervisor

cc:
Supervisor, Environmental Services, California Department of Fish and Game, Sacramento, 1416 Ninth Street, Sacramento, CA 95814.

APPENDIX E

[LOGO]

THE CITY OF SAFFORD

UTILITIES DEPARTMENT

P.O. Box 272 – Safford, Arizona 85548 – (602) 348-3143

2 March, 1995

Mayor, Van Talley
City of Safford
P.O. Box 272
Safford, Ariz. 85548-0272

R.E. Bonita Project – Cost of Compliance

Dear Mayor Talley,

The following is a brief narrative of compliance issues that were mandated by U.S. Fish and Wildlife on the Bonita water system project. These mandates were followed in order to restore the Bonita water system. As you know, the Bonita water production system is vital not only to the City of Safford but to the entire area. The system serves a minimum of 18,000 people, from Central, East to San Jose, including the State Prison.

1. The disastrous flood of January, 1993 severely damaged the Bonita water system. As soon as the flood waters receded, City forces secured an Engineer, emergency repairs were started. Emergency efforts to produce water from expensive backup wells were implemented. FEMA was on hand immediately to assist with emergency funding.

2. At this time, U.S. Fish and Wildlife shut the project down, because the area had been designated as a critical habitat for the razorback sucker. The shut down resulted

in a delay of reconstruction for 6 months. In the meantime all emergency wells were in production, at great cost to the City of Safford.

3. City staff worked several weeks with FEMA, U.S. Army Corp. of Eng., ADEQ and the City's consultants, Engineers Inc. securing permits and developing a plan of action that was suitable to U.S. Fish and Wildlife.

4. As part of the plan of action, temporary culverts were installed at every creek crossing. In an effort to keep vehicular traffic from crushing minnows. At great effort, no equipment entered the creek. All work was performed outside the stream flow.

5. Part of the plan of action called for rock filter beds placed just below the construction area in an effort to prevent silt from irritating the gills of minnows and to maintain water that was suitable for fish reproduction. Filters and fish screens were also installed at upper culvert crossings to prevent minnows from traveling upstream to the construction site.

6. During the shutdown, an environmental assessment of the area was conducted. Specialists from BLM were used. FEMA contracted with Eco Plan Associates, a private environmental consulting firm, to perform a preliminary assessment. Minnows in the creek were shocked and removed to safe locations, downstream by BLM specialists and crews of City personnel.

7. City personnel monitored the creek flow 5 times per day, during all reconstruction, insuring that turbidity levels in the creek water did not exceed 50 NTU.

8. A water truck was rented and a driver hired to keep the access roads watered so that dust would not interfere with reproduction efforts of the bird population. As a matter of interest, construction crews, including myself

noted and took pictures of deer, javelina and wild turkeys, watering at the construction site, all during construction. It was also noted by BLM fisheries biologists that there were no razorback suckers in the creek nor could they survive in the creek, under normal conditions.

9. The City installed 300 gallon trash barrels at key locations and a 5 yard dump truck was rented to insure that trash was cleaned up and hauled out. Any equipment fluid spills were quickly removed, including the dirt by City forces and hauled from the canyon.

10. It was determined that no equipment used could have any fluid leaks. As a result, staff spent considerable time investigating equipment rental agencies in an effort to rent equipment that met the criteria demanded by the project.

11. Equipment was rented that employed the use of plastic "diapers" underneath, to prevent any possible fluid leaks from contacting the soil or stream flow. Only new or very near new equipment was rented, in an effort to insure that no fluid leaks would be presented to the project. Equipment costs to date are approximately $5 million. It is estimated that at least 5% of this cost could have been saved if some local equipment were used and new equipment from outside the valley was not rented. There are no estimates available as to adverse impacts to the local economy because local equipment did not meet U.S. Fish and Wildlife standards. Insurance premiums were higher because of the liability exposure to environmental regulations.

12. Contracts were made with the equipment rental agencies, employing custom equipped service trucks, that vacuumed all oils from equipment and pumped

new replacement oils into the equipment. City crews spent extra time maintaining temporary access roads to all equipment so that the custom service trucks could access all equipment.

13. There were 9 portable toilets placed at key locations, personnel were strictly advised to use only these toilets, in an effort to prevent any possible pollution of the creek.

14. In an effort to comply with all regulations, a DSR for $106,000.00, to be used for riparian habitat restoration has been written by FEMA, to the City of Safford.

Staff has not had sufficient time to compile an accurate Cost of Compliance from records. An accurate cost would be available in approximately 30 days. However, after carefully reviewing the chain of events and some records, the estimated Cost of Compliance is $1,090,-620.00.

If you have further questions, or need more information, please feel free to call.

Sincerely,

/s/ Mike Squire
Mike Squire, Util. Op. Supt.

APPENDIX F

Documents Pertaining to
Emergency Breach Management Plan
Fire Island, New York

Application of Regional Director Ray E. Cowen, P.E., New York State Department of Environmental Conservation, for a Permit under New York State Environmental Conservation Law (ECL) regarding Protection of Water, Water Quality Certification, Tidal Wetlands and Coastal Erosion Management (May 2, 1994)

Draft Interim Breach Management Plan, Fire Island National Seashore, New York (Aug. 25, 1994)

Mario M. Cuomo, Governor; Gail S. Shaffer, Secretary of State; Langdon Marsh, Commissioner, Environmental Conservation, GOVERNOR'S COASTAL EROSION TASK FORCE, FINAL REPORT – Summary of Recommendations (Sept. 1994)

Susan P. Elias-Gerken, James D. Fraser and P.A. Buckley, PIPING PLOVER HABITAT SUITABILITY ON CENTRAL LONG ISLAND, NEW YORK BARRIER ISLANDS – FINAL REPORT SUBMITTED TO THE NATIONAL PARK SERVICE (Sept. 1994)

Letter to Kevin R. Dubois, U.S. Fish & Wildlife Service, from Charles T. Hamilton, Natural Resources Supervisor, New York State Department of Environmental Conservation (Feb. 28, 1995)